ANALYSIS GROUP ECONOMIC, FINANCIAL and STRATEGY CONSULTANTS

FORUM

FALL 2014

FROM THE CEO

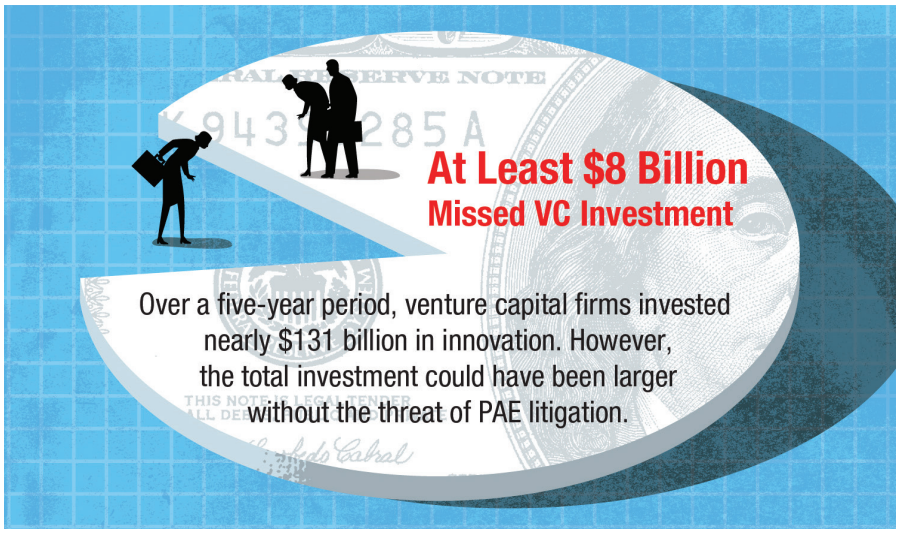
In the past year, Analysis Group has helped our clients address increasingly complex needs. As we continue to expand our professional staff, we are also proud of our network of affiliated academic experts, who provide invaluable direction with state-of-the-art approaches to address complex financial and economic issues.

In this issue, we showcase their range of expertise. From MIT Sloan School of Management Professor **Catherine Tucker**'s cost analysis of litigation by patent assertion entities to Yale School of Management Dean **Edward Snyder**'s innovative assessment of vertical mergers to University of Chicago Booth School of Business Professor **Douglas Skinner**'s breakdown of proposed auditing standards to UCLA Professor **John Asker**'s research into bid rigging damages, our affiliates offer cutting-edge insights that benefit our clients.

Our access to diverse, complementary capabilities remains essential to our growth and our clients' success as we look ahead.

MARTHA S. SAMUELSON, PRESIDENT AND CEO

Patent Litigation and the Innovation Economy



Momentum over patent reform has waxed and waned over the past several years. Throughout, there has been a constant backdrop of concern about patent assertion entities (PAEs), which the Federal Trade Commission defines as firms with a business model based primarily on purchasing patents and asserting the intellectual property against persons already using those technologies. New research demonstrates that PAEs have, in fact, increased litigation costs and deterred innovative activity.

Intellectual property lawsuits brought by PAEs can be extremely costly for organizations, and many companies now contend that PAEs also inflict indirect economic damage by inhibiting investment. Startups in innovative sectors such as high technology, for example, are often required to list all ongoing litigation when applying for venture capital (VC) funding. A study by Analysis Group affiliate and MIT Sloan School of Management Professor **Catherine Tucker** recently quantified the economic impact of PAE-related activity.

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Patent Litigation (continued from page 1)

The study provides concrete recommendations for policymakers interested in addressing the impacts of PAEs:

The report suggests that the U.S. patent approval process adopt similar quality thresholds to the processes in the European and Japanese patent offices, where higher-quality patent standards are associated with reduced PAE litigation. The report's findings suggest that patents that are registered by all three bodies are much less likely to be substandard and generally face decreasing threats of litigation.

The report also recommends altering the allocation of costs in the patent litigation system by reallocating more of the risks and costs of litigation away from the defendants to the plaintiffs. The study suggests that because PAEs "do not actually manufacture anything, they bear fewer costs in terms of discovery and preparing for trial," which allows them to more easily shoulder the relatively lighter risks and costs associated with plaintiffs in PAE litigation.

Her research, "The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity" – funded by the Computer & Communications Industry Association (CCIA) and supported by Analysis Group Managing Principal **Lau Christensen** and Manager **Greg Rafert** – found that VC investment would likely have been at least $8.1 billion higher over the course of a five-year period but for litigation brought by PAEs. These estimated losses represent a significant percentage of the nearly $131 billion actually invested in startups and innovation in these same five years.

In a CCIA press release, Professor Tucker concluded: "Some protection of intellectual property can lead to more innovation. However ... litigation by [PAEs] did not foster entrepreneurial investment at all. It is instead associated with significantly reduced venture capital investment in entrepreneurship, preventing startups from developing and suppressing job growth." Professor Tucker's report estimates that, in addition to losses in withheld VC investments, the direct costs of PAE litigation – including legal fees and settlements – were between $3.8 billion and $18.9 billion in 2012. These costs include only PAE litigation that reaches U.S. courts, excluding cases involving settlements that are covered by non-disclosure agreements. The report contends that the true direct and indirect costs of PAE litigation could be much larger than existing estimates.

The study also finds that although VC investment tends to increase "with the number of litigated patents," there is also a "tipping point at which further increases in the number of patents litigated are associated with decreased VC investment." This trend is particularly pronounced for high-technology patents and suggests that numerous startups are now vulnerable to early- to mid-stage PAE litigation, which, the report suggests, "is directly associated with decreased VC investment with no positive effects initially." ■

Favorable Outcome in Mobile Device Technology Patent Suit

A jury in the U.S. District Court for the Middle District of Florida (Orlando Division) found that the accused products of Analysis Group client BlackBerry Limited and BlackBerry Corporation did not infringe NXP B.V.'s asserted patents, and that those patents were invalid. Accordingly, no damages were awarded. Analysis Group was retained in this suit related to three patents that allegedly covered technology used in mobile devices. NXP sought significant total claimed damages against BlackBerry based upon a running per-unit royalty payment structure for each of the asserted patents.

An Analysis Group team led by Managing Principal **Keith R. Ugone**, Ph.D., and Manager **Krishnan A. Ramadas** conducted an independent evaluation of the plaintiff's claimed damages. Dr. Ugone testified in deposition and at trial that NXP's claimed damages were significantly overstated in light of relevant value indicators associated with the asserted patents and comparable outbound license agreements executed by BlackBerry.

Consolidation, Coordination, and Competition: A Challenging Prescription for Health Care

One of the objectives of the Affordable Care Act (ACA) is to encourage health care providers to improve the quality and efficacy of patient care by coordinating services. Many hospitals and physician groups are seeking to achieve this goal, and to reduce costs, through mergers. As consolidation among health care providers continues, some transactions have triggered concerns over potentially anticompetitive arrangements. In these cases, which are subject to government investigations and private actions, antitrust economists are called on to examine possible competitive effects of the transaction in question, market definition and market power, and any potential price impact on consumers and competitors. The issues in these matters point to the challenges of implementing the ACA to its full effectiveness in the broader context of preserving a rigorous antitrust policy.

CASE IN POINT

Saint Alphonsus Medical Center - Nampa et al. v. St. Luke's Health System Ltd.

In the first case challenging a health system's acquisition of a physician group to go to trial since the ACA became law, U.S. District Judge B. Lynn Winmill ruled that St. Luke's Health System's acquisition of Saltzer Medical Group – the largest independent, physician-owned, multispecialty group in Idaho – was anticompetitive and ordered St. Luke's to unwind the acquisition. Analysis Group and academic affiliate Professor **Deborah Haas-Wilson** of Smith College were retained by attorneys representing plaintiff Saint Alphonsus Health System to evaluate the likely competitive effects of the acquisition. The lawsuit, which was a companion case to one brought by the Idaho Office of the Attorney General and the Federal Trade Commission, alleged that the acquisition would substantially lessen competition for health care services, in violation of federal and state antitrust law.

Under the direction of Professor Haas-Wilson, Managing Principal **Tasneem Chipty** led an Analysis Group team that included Managers **Kristen Comeaux** and **Daniel Andersen** in undertaking complex, multidimensional analyses of claims data to tackle issues of market definition and market power, and to assess the impact of prior St. Luke's acquisitions on physician referral practices. Citing Professor Haas-Wilson's trial testimony, Judge Winmill noted that after each of five different physician practice acquisitions by St. Luke's, the acquired physicians moved their referrals to St. Luke's. Judge Winmill concluded, "After the Acquisition, it is virtually certain that this trend will continue and Saltzer referrals to St. Luke's will increase."

The ruling has already attracted the attention of industry participants and antitrust practitioners. "In this era of rising health care costs, the St. Luke's case is an important example of the oversight health care transactions are likely to receive from private, state, and federal agencies," according to Dr. Chipty. "Now more than ever, merging parties will need to demonstrate the presence of sufficient competition in all aspects of health care that may be affected by the transaction in order to allay antitrust concerns."

DEBORAH HAAS-WILSON IS THE MARILYN CARLSON NELSON PROFESSOR OF ECONOMICS AT SMITH COLLEGE. SHE IS AN EXPERT IN HEALTH CARE ANTITRUST, INCLUDING THE COMPETITIVE EFFECTS OF VERTICAL CONSOLIDATION IN HEALTH CARE MARKETS. **TASNEEM CHIPTY** ALSO SERVES AS AN EXPERT ADVISOR TO THE MASSACHUSETTS HEALTH POLICY COMMISSION, AND RECENTLY ASSESSED THE LIKELY COMPETITIVE EFFECTS OF THE STATE'S LARGEST HEALTH CARE PROVIDER'S PLANNED ACQUISITION OF A LOCAL HOSPITAL.

What Is a Prudent Investment? Using Simulation to Evaluate Investment Selections

Under the Employee Retirement Income Security Act (ERISA), plaintiffs may file suit alleging that the selection of certain retirement investments was imprudent. Such litigation occurs after a retirement plan incurs substantial losses.

In his article "Expert Analysis: Using Simulation to Assist Courts in Assessing the Prudence of Retirement Plan Investment Decisions" (Bloomberg BNA's *Pension & Benefits Daily*), Managing Principal **D. Lee Heavner** describes some approaches that experts use to evaluate issues related to the procedural and substantive prudence of the selection of a retirement plan investment. He also offers a case study that illustrates how simulation analysis can be used to evaluate whether a decision resulted in an appropriate balance of expected return and risk.

The case study involves a dispute over the prudence of the selection, in December 2007, of a target date 2020 fund for a retirement plan. The selected fund had a higher allocation to equity than most other target date 2020 funds and incurred substantial losses when the stock market declined precipitously in 2008. Plaintiffs alleged that the selection of the fund was imprudent because the fund's asset allocation made the fund excessively risky.

However, the defendant's expert's simulation analysis in this case showed that there was a 75-percent probability that the selected fund's asset allocation would outperform the allocation that the plaintiffs' expert opined was prudent. The analysis showed that this greater likelihood of outperformance came with a 1-percent increase in the probability of negative returns. Based on these and other analyses, the expert opined that the selected fund's asset allocation was appropriate for the fund at issue.

Moreover, the simulation approach allowed the expert to explain the return-risk tradeoff associated with investment selection without requiring the court to understand more complex statistical concepts. According to Dr. Heavner, "Simulation not only offers a way to evaluate the statistical properties of longer-period returns, but it also provides experts with a more ready format with which to communicate these complex findings in a way that is intuitive and accessible to the court." ■

For a retirement plan investment that selected a 12-year target date mutual fund, simulation analysis can assess the return-risk tradeoff of asset allocations by generating average annualized returns for thousands of 12-year return series for 80/20 allocations and 65/35 allocations.

Simulation Results: Distribution of 12-Year Annualized Returns	Allocation to Equity/Fixed Income	
	80/20	65/35
Average annualized return	9.8%	9.1%
Standard deviation of annualized returns	4.8%	3.9%
Probability that...		
...the portfolio outperforms	75.4%	24.6%
...the annualized return is at least 0%	97.8%	98.8%
...the annualized return is at least 5%	84.0%	85.5%
...the annualized return is at least 6%	78.2%	78.6%
...the annualized return is at least 6.25%	76.8%	76.8%
...the annualized return is at least 7%	72.3%	71.1%
...the annualized return is at least 8%	64.9%	61.8%
...the annualized return is at least 9%	57.3%	52.2%
...the annualized return is at least 10%	48.6%	41.7%

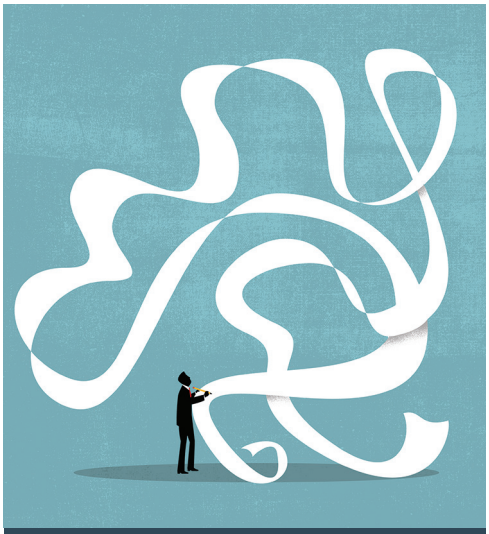
The Cost of Disclosure: Audit Fees and Liability Claims May Be on the Rise

The Public Company Accounting Oversight Board (PCAOB) has solicited public comments on a new proposed auditing standard that would provide previously undisclosed information to financial statement users regarding the audit and the auditor's determinations. Analysis Group Principal **Elizabeth Eccher** spoke with academic affiliate and accounting expert **Douglas Skinner** about how this standard could potentially affect disclosure issues in litigation.

Could this standard offer potential benefits to users of financial statements?
Yes, the standard would provide additional information to financial statement users, including the identification and discussion of critical audit matters (CAMs) as determined by the auditor, and would retain the pass/fail model in the existing auditor's report.

The PCAOB believes that communicating CAMs will make the auditor's report more relevant and useful. Because CAMs often require difficult, subjective, or complex auditor judgments, this type of information would likely enhance investors' reliance on the ultimate pass/fail opinion issued by the auditor. Theoretical work in economics shows, generally, that increased disclosure of relevant information reduces information asymmetries in capital markets and can result in improvements in market liquidity and improved pricing, including a lower cost of capital. These benefits accrue to both investors and firms.

Auditors already collect CAM information. Would you anticipate additional costs as a result of the new standard?
I would. Because the proposed CAM disclosures could result in additional disclosure about companies beyond what is currently required in SEC filings, the rule could impose additional disclosure costs on companies and auditors. These costs, including potential litigation costs, are difficult to quantify but could be very significant. Academic research shows that expected litigation costs are a big driver of audit fees. By expanding the auditors' role and disclosures, we are likely to see increases in both the extent to which auditors are held liable for client firm problems and the magnitude of the associated damages claims. It's hard to imagine a world in which audit fees will not increase if these proposals go forward.



"It's hard to imagine a world in which audit fees will not increase if these proposals go forward."

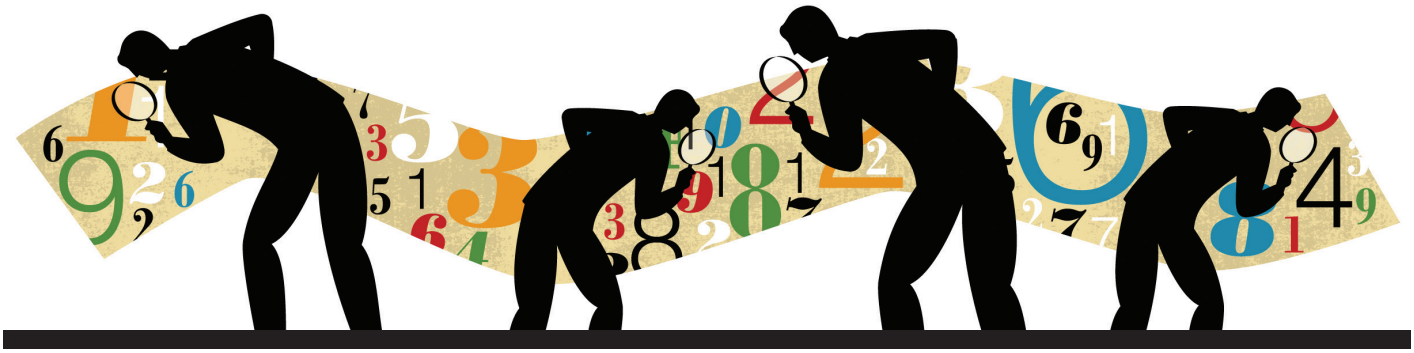
— PROFESSOR DOUGLAS SKINNER

Are there other potential consequences?
By requiring auditors to report CAMs, the audit report could become a disclosure mechanism in its own right, giving rise to proprietary costs. These are the costs of additional disclosures that provide important competitive information about the firm's operations and strategies to competitors, suppliers, customers, or other entities with which it conducts business.

Research on the "real effects" of disclosures suggests that mandated disclosures can affect the actions taken by the affected parties. Will that be the case?
Yes. The implication of "real effects" is straightforward: once auditors and client firm personnel know that the auditors will be reporting additional, detailed information about the CAMs and how auditors have addressed those matters, it will likely change their incentives going into the audit. Managers may be less open and forthcoming in providing information to the auditor, and may even change how they make certain operating and financing decisions. Precisely how the actions of firms and auditors will change under the new requirements is difficult to predict ex ante and is likely to vary across firms, particularly if there is uncertainty and lack of clarity about the definition of CAMs. ■

DOUGLAS J. SKINNER IS THE ERIC J. GLEACHER DISTINGUISHED SERVICE PROFESSOR OF ACCOUNTING AT THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS. HE PRESENTED REMARKS ON THESE PROPOSED CHANGES AT A PCAOB PUBLIC MEETING IN WASHINGTON, D.C. **ELIZABETH ECCHER** IS A PRINCIPAL IN ANALYSIS GROUP'S CHICAGO OFFICE.

Anticipating Exclusion: Upward Pricing Pressure in Vertical Transactions



Vertical mergers and acquisitions, in which entities operate at different levels of production, face scrutiny from antitrust authorities in multiple jurisdictions. For example, when Toyota Industries Corporation (TICO), a manufacturer of lift trucks, moved to acquire Cascade Corporation, a manufacturer of state-of-the-art lift truck attachments, the U.S. Department of Justice (DOJ) raised concerns that the vertical transaction would result in exclusionary conduct and that Cascade might withhold its specialized attachments from TICO's rivals or raise prices.

To assess the competitive impact of this transaction on both product markets, the DOJ developed a merger simulation model, which suggested that the transaction might result in exclusionary conduct and price increases. As an Analysis Group team successfully demonstrated, however, these findings were not only based on several factually inaccurate assumptions, they also defied past experience. Analysis Group academic affiliate and Yale School of Management Dean **Edward Snyder** explains that "a careful review of competitive interactions in the industry prior to the proposed merger" demonstrated "that TICO did not raise prices to competitors after that merger and that it generally left the competitive landscape unchanged." Professor Snyder adds, "Our findings were at odds with the DOJ's simulation."

In a vertical merger like TICO-Cascade, the merged firm may lose sales to other manufacturers if it raises prices. Managing Principal **Pierre Cremieux** points out that "specific factors, such as the relative prices and margins for trucks and attachments, and downstream competitors' ability to purchase the upstream product elsewhere, can help determine whether or not the firm will have an economic incentive to exclude competitors by increasing the price." A close examination of industry-specific factors, such as the connection types between attachments and trucks, the maturity of the technology, and limited patent protections, demonstrated that downstream purchasers could simply go elsewhere if TICO-Cascade chose to engage in anticompetitive behavior.

For regulators and interested stakeholders, analytic techniques now make it possible to quickly quantify the likely competitive effects associated with this type of vertical merger based on a methodology called the "vertical gross upward pricing pressure index" (vGUPPI) – that is, the pricing incentives of the newly merged firm and its rivals and the associated effect on final prices. In TICO-Cascade, the application of vGUPPI analysis led to the development by Analysis Group of an innovative software tool that can also be applied to other proposed vertical mergers. While this new online instrument does not offer a complete analysis – and is no substitute for the type of rigorous assessment necessary to fully evaluate a proposed merger – it does offer an initial screen or "first look" at the potential competitive effects of a vertical merger.

For interested firms, the identification of early warning signs in domestic and cross-border mergers is likely only to increase in importance. Senior Economist **Markus von Wartburg**, who was involved in TICO-Cascade and in the development of the vGUPPI online tool, argues that "the types of first-round pricing impacts measured in vGUPPI can have significant implications in related litigation. The Analysis Group vGUPPI online tool was designed to quickly determine the significance of pricing pressure in a vertical merger and anticipate potential problems." ■

PLEASE CONTACT US AT **MERGERANALYSISTOOLS@ANALYSISGROUP.COM** WITH ANY QUESTIONS, OR IF YOU WOULD LIKE TO SPEAK WITH ONE OF OUR CONSULTANTS.

Q&A

Stamps, Bid Rigging, and Antitrust Damages

*Analysis Group affiliate and antitrust scholar **John Asker**, in conversation with Managing Principal **Tasneem Chipty**, shares insights from his original analyses of data in* New York et al. v. Feldman et al., *a bid rigging lawsuit brought by the states of New York and California that involved alleged collusion over collectible stamps.*[1]

What is a bidding ring?

A bidding ring is a collection of bidders who collude in an auction to suppress competition for the purpose of paying lower prices. A bidding ring engages in "bid rigging" – one of the most common forms of antitrust allegations pursued by state and federal antitrust authorities.

How is bid rigging different from price-fixing?

Both are forms of competitor collaborations for the purpose of suppressing competition; however, in bid rigging, typically only a single ring member wins the target auction. Thus, the winner often compensates its ring collaborators for not competing for a particular lot at auction to keep prices low. If individuals have private values for the goods being sold, a common way to identify the winning ring member and compensating side-payments is through a private auction – known as a "knockout auction" – among the ring members. There is a long history of such knockout auctions in markets for collectibles such as rare books, art, rugs, stamps, coins, and antiques. This mechanism can have important implications for the success of the conspiracy.

In the alleged stamps conspiracy, for example, bidding observed in the knockout auction provided the basis for side-payments. The alleged conspirators with higher knockout bids received larger side-payments, based on a formula. This mechanism seems to have created incentives to overbid in the knockout auction. Because knockout bids determined the alleged ring's bidding in the target auction, the overbidding sometimes benefited the seller and harmed the non-ring bidders by occasionally driving prices higher than they would have been in a normally functioning bidding market.

Stamps & Bid Rigging

Sellers incurred harm in **27%** of the auctions that the alleged ring won, and the selling price was depressed by **17%**.

Non-ring bidders won about **65%** of auctions but overpaid because of the alleged conspiracy about **10%** of the time in those instances.

What are the implications for calculating antitrust damages?

In bid rigging cases, damages to sellers are based on an overcharge calculated as the difference between the price the seller receives when the ring is operating and the price the seller would have received in the counterfactual world in which all bidders, including the active ring members, bid competitively at the target auction. Because of overbidding – induced by the incentives to earn bigger side-payments – the seller may actually incur no damages. Using an econometric analysis of data available from the alleged stamps conspiracy, I found that sellers incurred harm in 27 percent of the auctions that the alleged bidding ring won and, in those instances, the ring depressed the selling price by about 17 percent. In the majority of auctions (including those that the ring won), I found that the seller incurred no harm. Unlike price-fixing, bid rigging can also harm non-ring bidders, who could win the object but pay an inflated price competing against the ring's overbidding. In the alleged stamps conspiracy, I found that non-ring bidders won about 65 percent

CONTINUED ON PAGE 11

1. *New York et al. v. Feldman et al. , U.S. District Court, Southern District of NY, 01-cv-6691, 2004*

Real Estate Investment Trust Board Removed by Shareholders

In a matter arbitrated in Massachusetts, Analysis Group clients Corvex Management, a hedge fund, and Related Fund Management, a real estate investment fund, conducted a consent solicitation to remove the board of trustees of CommonWealth REIT, a publicly traded real estate investment trust. Unlike most equity REITs, CommonWealth is externally managed by Reit Management & Research LLC, which is owned by the two managing trustees of CommonWealth's board. Corvex sought removal of the board, claiming self-dealing and attributing the REIT's underperformance to the board members' mismanagement. The consent solicitation was approved by more than two-thirds of the REIT's shareholders but was blocked by the board; the matter then went into arbitration. After a two-week hearing, the arbitration panel ruled that the consent solicitation was not valid but sided with our clients, holding that CommonWealth's board was subject to removal without cause (notwithstanding CommonWealth's claim to the contrary) and that a new consent solicitation could be run. The panel also ruled in our clients' favor on the length of time that was permissible for the board to set the record date and to review the results of the consent solicitation.

The panel limited the informational burdens that the board sought to impose on Corvex and Related. In February and March 2014, Corvex and Related ran the new consent solicitation permitted by the panel's order, and CommonWealth's shareholders voted by an overwhelming supermajority to oust the board.

Working with attorneys from Gibson Dunn, an Analysis Group team led by President and CEO **Martha Samuelson** and Vice President **Samuel Weglein** supported several experts in the arbitration: Professor **Guhan Subramanian**, an authority on corporate governance, opined that Maryland law does not preclude removal of CommonWealth's board without cause and that the board's actions were not in the interest of the shareholders; Professor **Edward Rock** addressed the structure of CommonWealth's share ownership and opined on corporate governance issues; Dean **R. Glenn Hubbard** assessed the underperformance of the REIT and the quality of its management; and **Mark Harnett**, an expert in proxy voting, discussed the reasonableness of time periods associated with the consent solicitation process.

Other members of the Analysis Group team included Vice Presidents **Mike Nguyen** and **Orlando Visbal**, Managers **Peter Rybolt** and **Jason Gilbody**, and Associate **John Drum**.

Class Certification Denied in Deceptive Advertising Case

A judge in the U.S. District Court for the Northern District of California denied a motion for class certification in a matter against ConAgra Foods Inc. Plaintiffs alleged that three ConAgra products – PAM cooking spray, Hunt's canned tomato, and Swiss Miss hot cocoa – contained deceptive and misleading labeling. Plaintiffs sought to certify three California classes of consumers who purchased PAM products labeled "100% Natural," Hunt's products labeled "100% Natural" or "Free of Artificial Ingredients & Preservatives," and Swiss Miss products with an antioxidant claim.

An Analysis Group team – led by Managing Principal **Keith R. Ugone**, Vice President **Minh P. Doan**, and Associate **Jeffrey Hulbert** – was retained by Hogan Lovells on behalf of ConAgra to evaluate the plaintiffs' position that standard economic analyses could be used to quantify measures of monetary recovery on a class-wide basis. Dr. Ugone issued two expert reports opining that the claimed injury and damages suffered by putative class members could not be determined on a class-wide basis using common proof.

The Analysis Group team demonstrated that multiple hurdles existed that would prevent a reliable calculation of damages on a class-wide basis, and that the plaintiffs' proposed approaches would not yield reliable or relevant estimates of the alleged harm suffered by individual class members.

Wells Fargo Wins Jury Verdict in Securities Lending Matter

After a seven-week trial, a federal jury in Minnesota found that Wells Fargo did not misrepresent its investment strategy and was not liable on any plaintiff claims in a securities lending matter brought by a class of institutional investors. Plaintiffs alleged that Wells Fargo had grossly mismanaged investments in its securities lending program by putting assets in high-risk ventures and failing to disclose the deteriorating condition of the investments. The jury rejected allegations that the bank had marketed the investment program as risk free, responding to Wells Fargo's argument that the program losses were attributable to the financial crises. In a related ERISA matter, a judge in the U.S. District Court for the District of Minnesota dismissed allegations of fiduciary breach and fraud leveled against Wells Fargo.

A team from Analysis Group – including Managing Principals **Jeffrey Cohen** and **Andrew Wong**, Principal **Elizabeth Eccher**, Vice Presidents **Rebeccah Filsoof** and **Maria Lauve**, and Manager **Edi Grgeta** – was retained by counsel on behalf of Wells Fargo to support academic and industry experts in these matters. Analysis Group affiliates **John Peavy**, **Myron Glucksman**, and **John McConnell** addressed issues related to the customs and practices of securities lending programs, Wells Fargo's management of cash collateral, the market for structured investments, and the quantification of damages.

Favorable Outcome in Joint Venture Fraud Case

Delaware's Chancery Court decided in favor of Dutch company Koninklijke Philips Electronics, N.V. (Philips N.V.) in a fraud case brought by Italian businessman Carlo Vichi, who had loaned €200 million to a now-bankrupt joint venture of which Philips N.V. was a partial owner. Among other claims, Mr. Vichi alleged that Philips N.V. falsely represented that it would "stand behind" the joint venture's financial obligations and that Philips N.V. withheld from him that the joint venture benefited from a price-fixing cartel.

Attorneys at Sullivan & Cromwell LLP, representing Philips N.V., retained Analysis Group to help address Mr. Vichi's claims. An Analysis Group team, led by Managing Principal **Justin McLean** and Vice Presidents **Ajay Jyoti** and **Mike Cliff**, supported Analysis Group affiliate and independent consultant **Roberts Brokaw**, who opined on the characteristics of the loan at issue and aspects of the viability of the joint venture at the time of the loan. Another team, led by Managing Principal **Tasneem Chipty**, Vice President **David Mishol**, and Manager **Jonathan Borck**, supported academic affiliate **Robert Pindyck**, Bank of Tokyo-Mitsubishi Professor of Economics and Finance at MIT's Sloan School of Management. Professor Pindyck responded to the plaintiff's price-fixing allegations.

After a five-day trial, Vice Chancellor Donald Parsons Jr. found in favor of Philips N.V. and cited both Mr. Brokaw and Professor Pindyck favorably in his opinion. Vice Chancellor Parsons stated that Mr. Brokaw provided "unrebutted expert testimony" that the interest rate on the loan made by Mr. Vichi was inconsistent with a promise by Philips N.V. to stand behind it. Vice Chancellor Parsons also wrote in his decision: "As Philips N.V.'s antitrust expert, Robert Pindyck, noted in his expert report, however, [Plaintiff's] approach is problematic, because there is considerable variation in the effect that cartels have on prices and there are numerous examples of cartels that were entirely or nearly entirely unsuccessful at raising prices above competitive levels."

Spotlight on Analysis Group

Analysis Group Announces Senior Staff Promotion to Managing Principal

Michael Beauregard specializes in the application of economic, financial, statistical, and econometric analyses. He has consulted on a variety of civil and criminal antitrust, securities, and IP matters and has assisted counsel facing investigations by various U.S. and international government agencies, including the Department of Justice and the Securities and Exchange Commission.

Pro Bono Civil Legal Aid Work Honored by Boston Bar Association

Analysis Group was recognized along with members of the Statewide Task Force to Expand Civil Legal Aid in Massachusetts with the Boston Bar Association (BBA) President's Award at the BBA 2014 Annual Meeting Luncheon in Boston on September 12, 2014. President and CEO **Martha Samuelson**, Vice Presidents **Brian Ellman** and **Nikita Piankov**, and Senior Analyst **Isabelle Bensimon** contributed pro bono work on legal aid and homelessness to the BBA task force.

IP Experts Named to "IAM Patent 1000"

Managing Principals **John Jarosz**, **Carla Mulhern**, and **Keith R. Ugone** have been named by *Intellectual Asset Management* (IAM) to the *IAM Patent 1000* guide – a listing of leading patent services professionals based on extensive research and more than 1,500 interviews with patent specialists across the globe. Mr. Jarosz, Ms. Mulhern, and Dr. Ugone were included in a list of 43 top economic expert witnesses in the United States.

Antitrust Experts File Amicus Curiae Brief

A group of antitrust economists filed an amicus curiae brief with the U.S. Third Circuit Court of Appeals with respect to *In re Lamictal Direct Purchaser Antitrust Litigation*, which involves the treatment of exclusive licensing agreements between manufacturers of branded and generic drugs. Signatories include Analysis Group Chairman **Bruce Stangle**, Managing Principals **Pierre Cremieux** and **Paul Greenberg**, and Principal **George Kosicki**, as well as academic affiliates Professor **Henry Grabowski** of Duke University, Professor **James Hughes** of Bates College, and Professor **Michael Wohlgenant** of North Carolina State University.

Recent Publishing

Guide to Econometric Analysis

Several Analysis Group consultants contributed to the book *Econometrics: Legal, Practical, and Technical Issues (Second Edition)*, published by the Antitrust Law Section of the American Bar Association. The book serves as a guide and resource to help antitrust attorneys understand econometric analysis and work more effectively with economic experts.

Managing Principal **Bruce Deal** and Vice President **Samuel Weglein** provided content for the chapter "Presentation of Econometric Analyses." Managing Principals **Pierre Cremieux** and **Adam Decter**, along with Vice President **Dov Rothman**, contributed to the chapter "Applying Econometrics to Address Class Certification."

Big Data in Health Care

In "Big Data Can Yield Big Insights On Promotional Practices" (*Law360*, August 14, 2014), Managing Principal **Paul Greenberg** and Vice President **Tamar Sisitsky** discuss how the prevalent use of big data and analytics has affected the way in which both government investigations and private litigation have unfolded with respect to allegations of improper promotional practices by manufacturers in the health care sector. According to the authors, the ubiquity of big data at the negotiating table and in the courtroom has not only increased the analytical complexity required to address familiar litigation questions, it has also raised the bar on the types of questions being asked.

Leaders from Analysis Group's Health Care practice discuss their related work in the Fall 2014 *Health Care Bulletin,* "Big Data in Health Care: New Characteristics, Diverse Approaches." Read more at analysisgroup.com.

Spotlight on Featured Affiliated Experts

John Asker

University of California, Los Angeles

Professor Asker is an expert in antitrust economics, microeconomics, and empirical methods. He studies cartel behavior, vertical restraints, auction design, pricing strategy, and the effects of industry subsidies. Professor Asker has served as an economic consultant as well as a political advisor.

Douglas J. Skinner

The University of Chicago Booth School of Business

Professor Skinner's research focuses on corporate finance and financial reporting, including payout policy, earnings management, corporate disclosure policy, the effect of firms' accounting and disclosure policies on securities prices, and international accounting issues including fair value.

Edward A. Snyder

Yale School of Management

Professor Snyder is Dean of the Yale School of Management and an industrial organization economist with expertise in antitrust policy and enforcement, contracting practices, financial institutions, law, and economics. He has served as a testifying expert in high-profile cases involving antitrust and class certification issues.

Catherine E. Tucker

MIT Sloan School of Management

Professor Tucker specializes in antitrust economics, with a particular focus on two-sided markets, online networks, privacy and data security, and intellectual property issues. She has testified and widely published on issues related to privacy regulation and technology diffusion.

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Bid Rigging Q&A (continued from page 7)

of auctions and overpaid because of the alleged conspiracy about 10 percent of the time in those instances.

What data and methods might you use to calculate bid rigging antitrust damages?

That type of analysis requires a detailed understanding of the coordination mechanisms used by the alleged ring and data on actual bid patterns at the knockout and target auctions. This information, which is typically available through the discovery process, can be coupled with well-established auction econometric techniques to recover the distribution of bidder valuations.

Comparisons with the actual distribution of bids can then be used to characterize the extent to which the alleged conspiracy succeeded (if at all) at depressing prices. ■

JOHN ASKER (SEE ABOVE) HAS PUBLISHED RESEARCH ON BID RIGGING AT STAMPS AUCTIONS, WHICH CAN BE FOUND IN "A STUDY OF THE INTERNAL ORGANIZATION OF A BIDDING CARTEL," *AMERICAN ECONOMIC REVIEW* (JUNE 2010). **TASNEEM CHIPTY** IS A MANAGING PRINCIPAL IN ANALYSIS GROUP'S BOSTON OFFICE.

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In This Issue

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Sizing Up the Competition: High-profile or highly profitable firms are no longer the sole targets of post-merger divestitures by antitrust enforcers. In a web feature, Managing Principal Rebecca Kirk Fair describes the review of Bazaarvoice's 2012 non-reportable acquisition of PowerReviews for $160 million and explores the economic arguments and evidence relied on by the court.

EPA's Clean Power Plan: States are well positioned to implement the Environmental Protection Agency's Clean Power Plan, according to a new study conducted by Analysis Group Vice Presidents Paul Hibbard and Andrea Okie, and Senior Advisor Susan Tierney. Their report is based on an analysis of state policies related to carbon emission regulation, emission compliance strategies, compliance cost recovery, and consumer protection.

Economics of IP Litigation: *Inside Counsel* recently profiled Analysis Group Managing Principal John Jarosz about trends in intellectual property litigation. In "Analysis Group's John Jarosz Discusses Economic Testimony in IP Litigation" (August 11, 2014), Mr. Jarosz discusses the role of economic experts in IP cases and offers advice for in-house counsel to be involved in hiring such experts.

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